No. 14,324

United States Court of Appeals

For the Ninth Circuit

DeAngelis Coal Company, a Co-Partnership; American Lignite Products Co., a Co-Partnership; Nazzareno DeAngelis, Vincenzo DeAngelis, Mary DeAngelis, Joseph DeAngelis, Frank DeAngelis, Individually and as Co-Partners, doing business under the name of American Lignite Products Co.,

Appellants,

vs.

The Sharples Corporation,

Appellee.

APPELLANTS' ANSWER TO APPELLEE'S PETITION FOR A REHEARING.

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APPELLANTS' ANSWER TO APPELLEE'S PETITION FOR A REHEARING.

To the Honorable Albert Lee Stephens, Walter L. Pope and James Alger Fee, Circuit Judges of the United States Court of Appeals for the Ninth Circuit:

Appellants herewith answer Appellee's Petition for a Rehearing. Each of the points upon which Appellee predicates his petition for a rehearing are answered

herewith in the same order in which those points appear in Appellee's petition on file herein. Appellee will be hereinafter referred to as "Sharples", Appellants will be hereinafter referred to as "DeAngelis".

I.

APPELLANTS DID NOT CONTRACT WITH APPELLEE AS OF THE TWENTY-SECOND DAY OF FEBRUARY, 1952, OR AT ANY OTHER DATE, TO INCUR A TWENTY-FIVE (25%) PER CENT "CANCELLATION CHARGE" INCIDENT TO THE RETURN OF THE UNIT IN QUESTION.

There is no support in this record that as a matter of law, the parties entered into a binding contract for the payment by DeAngelis to Sharples of a 25% cancellation charge. The comment upon the evidence consisting of a review of relative correspondence between the parties and of the law applying thereto was fully included within Appellants' (DeAngelis) opening brief. Sharples reasserts in its petition for a rehearing that the acceptance by DeAngelis of a 25% cancellation charge was manifested by the return of the machine. However, as was clearly pointed out in the Opinion of this Court reversing the lower court, the shipment of the machine by DeAngelis under the circumstances here present was not an unequivocal act. An acceptance must be unequivocal; it must be positive and unambiguous. Cf. *Williston on Contracts,* paragraph 72; *Restatement of Contracts,* paragraph 58. The act of DeAngelis in returning the unit did not constitute an acceptance of Sharples' purported offer. As has been pointed out

in Appellants' (DeAngelis) opening brief, in the law of contracts "There is a presumption that an offer invites a bilateral contract—a promise for a promise". *Davis v. Jacoby,* 1 Cal. 2d 370, 34 Pac. 2d 1026 (1934); *Restatement, Contracts,* Section 31 (1932). Professor Williston in his treatise on contracts, Volume 1, Section 60, also takes the position that a presumption in favor of bilateral contracts exists. In the comment following Section 31 of the Restatement the reason for such presumption is stated as follows:

> "It is not always easy to determine whether an offeror requests an act or a promise to do an act. As a bilateral contract immediately and fully protects both parties, the interpretation is favored that a bilateral contract is proposed."

Additionally, it is not true as is contended by Sharples that a binding contract for the payment of the cancellation charge came into force upon the shipment of the machine, unqualified in any manner. The evidence is overwhelming that DeAngelis resisted payment of any service charge under all circumstances. Without exception DeAngelis had pressed its claim that the purchase was upon a guaranty and that performance had failed. It is also additionally abundantly clear that the shipment of the machine by DeAngelis was an equivocal act in that it could be construed to have been an act performed pursuant to its own insistence that there had been a breach of warranty and that it had an absolute right to return the machine.

Appellee (Sharples) now, in its petition for a rehearing, raises the point that "If DeAngelis wished to preserve any claimed rights against Sharples it was a simple matter for them to qualify their act of shipment of the machine when it did so." Its postcard acknowledgment of acceptance of the machine (Defendants' Exhibit D, Tr. 46) is certainly unqualified, and indicates upon its face by the "X" mark prefacing the statement that "a credit will be issued to your account". They could have accepted the machine for the account of DeAngelis; they could have refused acceptance of the machine, but they did neither of these things—they unqualifiedly accepted the machine for credit.

The case of *Cate v. Good Bros.* (Cir., 3) 181 Fed. 2d 146, is not in point with relation to the facts of this case. There, as here, the door is wide open for the seller to give the buyer credit for the net proceeds of any resale and require payment of the balance. That is the point that Appellants (DeAngelis) have been steadfastly arguing for, that is that the complaint, if advised, should have been couched in terms of a complaint for damages, if any, for a breach of the original contract of purchase and sale.

There was no separate or distinct contract between the parties and therefore there is no necessity for a rehearing as such. The opinion, together with the concurring opinion, should stand as rendered.

II.

Appellee's (Sharples) discussion of the question of warranty or guaranty is not before this Court and was not before the Court upon appeal. The fact that DeAngelis did not prevail in its claim of breach of warranty in the lower Court does not affect in any particular the lack of separate contract to pay a cancellation charge. The evidence before this Court included within the transcript of record abundantly supports the statements in the opinion and concurring opinion filed herein that DeAngelis continuously and repeatedly and vehemently pressed its claim that the machine didn't do the work it was supposed to have done, that it was unsatisfactory and that they were going to return it. The record further shows that DeAngelis did put into temporary use and pay for fully one of the machines at a total cost of $13,500.00. It is quite true as Appellee in its petition for rehearing points out, that Sharples would have been wholly within its right to stand on the original contract of sale. Actually and resulting from the effect of the opinion rendered herein, it still has a right to stand on its contract of sale by the allowance of the right upon the part of Sharples to amend its complaint and to prove and recover if it may damages for the breach of the contract for sale.

III.

Under the heading number III of Appellee's petition for rehearing, Sharples takes exception to the

statements in the opinion and concurring opinion that DeAngelis had evidenced great dissatisfaction with the machine. There seems to be a confusing dissertation upon the identity of a "Super-D-Canter" and "super centrifuges". Certainly a reading of the transcript of the record will make apparent an abundance of support for the factual basis for the wording appearing in the opinion and concurring opinion of this Court. Whether the dissatisfaction in all instances was with the "super centrifuge" or Super-D-Canter, yet a determination of this question certainly would have no bearing whatsoever upon the question whether there was an effective enforceable separate contract for the payment of the 25% cancellation charge.

Appellee (Sharples) in the course of this dissertation upon the distinction between Super-D-Canter and the "super centrifuges" makes this statement: "At no time during the course of correspondence did DeAngelis put Sharples on notice that it claimed a breach of guarantee as to the PY-14 Super-D-Canter, which is the only machine with which we are concerned." (Appellee's Petition for a Rehearing, page 11.)

Starting with Plaintiff's Exhibit No. 5 and including Plaintiff's Exhibit No. 6, Plaintiff's Exhibit No. 8 and Plaintiff's Exhibit No. 10 (Tr. 34-42), that record is entirely contrary to Appellee's statement above quoted.

A review of these exhibits again points up the fact that the shipping of the machine by DeAngelis did

not constitute an acceptance of an offer of Sharples to accept the return of the machine by payment of a 25% cancellation charge but was motivated by the claim by DeAngelis that performance had failed, and that it could be construed to have been an act performed pursuant to its own insistence that there had been a breach of warranty.

The question before this Court upon this point is not whether the lower court had found against DeAngelis on its claim of breach of warranty but on the contrary the position of DeAngelis with reference to the inadequacy of this machine in the early part of 1952.

IV.

Under this paragraph Appellee (Sharples) complains that Appellants (DeAngelis) did not choose to designate the reporter's transcript of testimony taken during two days of trial as part of the record on appeal. Strangely, Appellee did not raise this question upon its initial consideration before this Court and the complaint now is that there might have been other or different evidence upon which the lower court based its judgment. Suffice it to say that no assumptions of fact were made in the opinion and concurring opinion of this Court which were not supported by the evidence included within the transcript of record in this case. Appellants (DeAngelis) believed and still believe that the record before this Court is amply sufficient to show the error of the

court below and that, had Appellees believed otherwise or had they believed that the record was not sufficiently complete, or sufficiently inclusive to have focused attention upon evidence favorable to them and contrary to or in confliction with the transcript of record before this Court, it had the power to, and would have requested an augmentation of the record upon consideration of the appeal herein.

For the reasons argued in Appellants' (DeAngelis) opening brief and supported by the opinion and concurring opinion of this Court upon this matter, Appellants respectfully submit that this Court should not grant to appellees a rehearing in this case.

Dated, Jackson, California,
April 11, 1956.

Respectfully submitted,
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